

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT WESTERN LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ESTA M. SNAVELY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED

JAN 24 1913

No. 2231

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT WESTERN LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ESTA M. SNAVELY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer.....	6
Answer of Court to Writ of Error.....	51
Assignment of Errors.....	44
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions.....	16
Bond on Writ of Error.....	48
Certificate of Clerk U. S. District Court to Transcript of Record, etc.....	55
Certificate to Judgment-roll.....	15
Citation on Writ of Error.....	52
Complaint.....	2
Exceptions, Bill of.....	16

EXHIBITS:

Plaintiff's Exhibit "A" (Insurance Policy).....	19
Plaintiff's Exhibit "B" (Receipt for \$164.70, from E. L. Biersmith to Ar- thur G. Snavelly).....	25
Plaintiff's Exhibit "C" (Receipt for	

Index.	Page
EXHIBITS—Continued:	
\$164.70 from E. L. Biersmith to Ar- thur G. Snavely).....	26
Plaintiff's Exhibit "D" (Receipt for \$164.70 from James Chappelle to Ar- thur G. Snavely).....	27
Plaintiff's Exhibit "E" (Letter Dated Kansas City, Mo., July 15, 1910, from J. R. Kruse to E. M. Niles).....	31
Plaintiff's Exhibit "F" (Letter Dated Kansas City, Mo., September 2, 1910, from J. R. Kruse to E. M. Niles).....	33
Judgment on Verdict.....	14
Motion for a Directed Verdict, etc., and Order Denying Motion of Defendant.....	42
Motion for Judgment on Pleadings and Order Denying Motion.....	41
Names and Addresses of Attorneys of Record..	1
Order Allowing, etc., Bill of Exceptions.....	43
Order Allowing Writ of Error and Fixing Bond.....	47
Order Granting Motion to Direct Jury to Ren- der Verdict for Plaintiff.....	43
Petition for Writ of Error.....	46
Proceedings had Friday, May 31, 1912, 2. P. M.—Opinion on Objection to Admission of Certain Proof.....	36
Replication.....	12
Stipulation Concerning Transcript of Record and Original Exhibits.....	53
Summons.....	4

Index.

Page

TESTIMONY ON BEHALF OF PLAINTIFF:

NILES, E. M..... 30

Cross-examination..... 33

SNAVELY, ESTA M..... 17

Cross-examination..... 29

TESTIMONY ON BEHALF OF DEFENDANT:

VAN DOREN, HAL..... 35

Transcript on Removal..... 1

Verdict..... 13

Writ of Error..... 50

Names and Addresses of Attorneys of Record.

H. J. MILLER, Esq., Attorney for Defendant and
Plaintiff in Error,

Livingston, Montana.

E. M. NILES, Esq., and FRED L. GIBSON, Esq.,
Attorneys for Plaintiff and Defendant in Error,

Livingston, Montana.

[Transcript on Removal.]

*In the District Court of the United States in and for
the District of Montana.*

No. 1041.

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

BE IT REMEMBERED, that on the 25th day of
February, 1911, a Transcript on Removal from the
District Court of the Sixth Judicial District of the
State of Montana, in and for the County of Park, was
duly filed herein, which said Transcript (except that
portion thereof omitted by stipulation) is in the
words and figures following, to wit: [1*]

*Page-number appearing at foot of page of original certified Record.

*In the District of the Sixth Judicial District of the
State of Montana, in and for the County of Park.*

ESTA M. SNAVELY,

Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
COMPANY OF KANSAS CITY, MO.,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of
action alleges:

I.

That the defendant is a corporation organized and
existing under and by virtue of the laws of the State
of Missouri.

II.

That on the 27th day of December, 1907, at Kansas
City, Mo., the defendant, in consideration of the an-
nual payment by Arthur G. Snavely of Livingston,
Mont., to the said company of the sum of One Hun-
dred Sixty-four and 70/100 (\$164.70) Dollars, made
their policy of insurance in writing, of which a copy
is hereto annexed, marked Exhibit "A" and made a
part of this complaint, and thereby insured the life
of the said Arthur G. Snavely in the sum of Five
Thousand Dollars.

III.

That on the 3d day of July, 1910, at Livingston,
Mont., the said Arthur G. Snavely died.

IV.

That the plaintiff is the widow of the said Arthur
G. Snavely and is the beneficiary named in the said

policy of insurance, and as such had a valuable interest in his life. [2]

V.

That on or about the 20th day of July, 1910, the plaintiff furnished the defendant with the proof of the death of the said Arthur G. Snavelly, and that the said Arthur G. Snavelly and the plaintiff have each duly performed all of the conditions of said insurance contract on their part.

VI.

That the defendant has not paid the said insurance nor any part thereof, and that the said sum of Five Thousand Dollars is now due thereon from the defendant to the plaintiff as such beneficiary.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of Five Thousand Dollars, with interest thereon at the rate of eight per cent per annum from the 3d day of July, 1910, together with costs and disbursements herein.

E. M. NILES,
Attorney for Plaintiff,
Livingston, Montana.

[For Plaintiff's Exhibit "A," Insurance Policy, see Exhibit inserted in Bill of Exceptions, p. 19.]
[3]

State of Montana,
County of Park,—ss.

Esta M. Snavelly, being first duly sworn, upon her oath says that she is the plaintiff in the foregoing entitled action; that she has read the foregoing complaint and knows its contents, and that the same is true of her own knowledge.

ESTA M. SNAVELY.

E. M. MILES,

4 *Great Western Life Insurance Company*

Subscribed and sworn to before me this the 21st day of November, 1910.

[Seal]

E. M. NILES,
Notary Public for Montana, Residing at Livingston,
Montana.

My commission expires Aug. 3, 1912.

[Indorsed]: Title of Court and Cause. Complaint. Filed Feb. 25, 1911. Geo. W. Sproule, Clerk U. S. Circuit Court, District of Montana. [4]

*In the District Court of the Sixth Judicial District of
the State of Montana, in and for the County of
Park.*

ESTA M. SNAVELY,

Plaintiff,

against

THE GREAT WESTERN LIFE INSURANCE
COMPANY,

Defendant.

Summons.

The State of Montana Sends Greeting to the Above-named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said court this
12th day of January, 1911.

[Seal]

ARTHUR DAVIS,

Clerk.

By W. H. Pethybridge,

Deputy. [5]

Sheriff's Office.

State of Montana,

County of Lewis and Clark.

I hereby certify that I received the within summons and copy of the complaint in said action on the 16th day of January, A. D. 1911, and personally served the same on the 16th day of January, A. D. 1911, on H. R. Cunningham, as Commissioner of Insurance of the State of Montana, by delivering to and leaving with said Commisisoner personally, in the county of Lewis and Clark, State of Montana, a copy of said summons and of said complaint.

Dated this 16th day of January, 1911.

MARTIN L. HIGGINS,

Sheriff.

By W. H. McCann,

Deputy Sheriff.

SHERIFF'S FEES:

Service on\$1.00

Mileage..... .20

Total.....\$1.20

Paid by Plaintiff.

[Indorsed]: Title of Court and Cause. Summons.
Filed Feb. 25, 1911. Geo. W. Sproule, Clerk U. S.
Circuit Court, District of Montana. [6]

And thereafter, on the 21st day of April, 1911, the defendant's Answer was duly filed herein, being in the words and figures following, to wit: [7]

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, in and for the Southern Division of the District of Montana.

ESTA M. SNAVELY,

Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
COMPANY OF KANSAS CITY, MIS-
SOURI,

Defendant.

Answer.

Comes now the defendant in the above-entitled action and for answer to the complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Defendant denies each and every and all and singular the allegations set forth and contained in said complaint, except that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri.

II.

Defendant alleges that the plaintiff should not recover by virtue of the facts alleged in said complaint, for that all of the conditions and agreements mentioned in the copy of said insurance policy attached to the plaintiff's complaint are herein incorporated the same as if written out herein and the said policy, a copy of which is attached to the plaintiff's com-

plaint, is hereby made a part of this answer by reference, and it is provided therein that if any premium shall not be paid on or before the date when due, the liability of the company shall be only as hereinbefore provided (meaning as provided in said policy, previous to that statement herein).

And the defendant alleges that on the 27th day of December, 1908, there was due according to the terms of said policy, as the annual premium therefor, the sum of \$164.70, and which premium, Arthur G. Snavelly, the insured, failed and refused to pay to the [8] said defendant, and failed and refused to pay the same for more than the thirty days of grace thereafter, whereby, the said policy became, from the 27th day of January, 1909, null and void for non-payment of said premium, long before the death of the said Arthur G. Snavelly mentioned in the complaint, and the said defendant, the said premium not having been paid when due or within the thirty days thereafter by the said Arthur G. Snavelly, did not become liable to the said plaintiff, by virtue of all of the other provisions set forth in said insurance policy, a copy whereof is attached to plaintiff's complaint.

III.

The defendant, further answering the complaint filed in this case, alleges that on the 27th day of December, 1908, and within thirty days thereafter, the said Arthur G. Snavelly mentioned in said complaint failed and refused to pay the premium on said policy as provided therein, whereby the said policy became null and void long before the death of the said Arthur G. Snavelly, but that on the 24th day of February, 1909, the said Arthur G. Snavelly men-

tioned in said complaint made application in writing to the defendant to renew said policy, a copy whereof is attached to the complaint, a copy of which application is in words and figures as follows, to wit:

“Certificate of Health and Revival of Contract.

To and with THE GREAT WESTERN LIFE INSURANCE COMPANY Policy No. 8303, on my life issued by The Great Western Life Insurance Company, having become forfeited and void for the non-payment of premium, due the 27th day of December, 1908.

Now therefore, for the purpose of obtaining a revival or reinstatement of said policy, and as the basis of such re-instatement, I hereby declare to and agree with said company that I am now in good health and free from every ailment and complaint. I further declare and agree that I have not made application for insurance to any company, society or person, upon which application no policy was or has yet been issued to or received by me for the full amount and kind, and at the rate applied for; that there has been no change in family history; that I have not had any injury, sickness or ailment of any kind; and that I have not consulted or been prescribed for by any physician or received any medical treatment since the date of my original application on which said policy was issued, except as here stated:

Operation appendicitis, Sept. 1-08. Off duty two weeks. Entirely recovered. [9]

And I hereby renew the statements and agreements contained in said original application, and expressly agree that if any answer or statement contained therein, except as modified in this contract, or if any

statement made or contained herein be untrue in any respect, then said policy is and shall continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. Said Policy shall not be revived until this certificate and revival contract be approved by said Company, it being understood that the future payments on said policy shall be promptly made.

ARTHUR G. SNAVELY (Insured).

Signature must be in own proper
handwriting of the insured.

Witness: ED. F. PARKER.

Signed at Livingston, Mont., this 24th day of February, 1909."

And falsely and fraudulently, for the purpose of obtaining a revival or reinstatement of said policy, and as a basis of such reinstatement, the said Arthur G. Snavely falsely and fraudulently declared therein to said company that he was in good health and free from every ailment and complaint, and that he had not had any injury, sickness or ailments of any kind, and that he had not consulted or been prescribed for by any physician or received any medical treatment since the date of his original application on which said policy was issued, except an operation for appendicitis, September 12th, 1908, and that he was entirely recovered therefrom, and the said Arthur G. Snavely also agreed in said application for reinstatement that if any answer or statement contained therein was untrue in any respect, then the said policy is and should continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. And the said defendant, believing said false and fraudulent representations to be true,

reinstated said policy on the 6th day of March, 1909, and the said defendant alleges that it was not true that the said Arthur G. Snavelly, on said 24th day of February, 1909, was in good health, and it was not true that he was at that time free of every ailment and complaint, and it was not true that he had not had any injury, sickness or ailment of any kind, but, on the contrary, he had many serious injuries, sicknesses and ailments, from the effects of which he died, and it was not true that he had not consulted or been prescribed for by any physician or received any medical treatment since the date of his [10] original application on which said policy was issued, except an operation for appendicitis, on September 12th, 1908. And it was not true that he had entirely recovered therefrom, and the said defendant alleges that because of said false and fraudulent representations so made by the said Arthur G. Snavelly to this defendant, the defendant was induced to believe the same and thereby did, on the 6th day of March, 1909, revive and reinstate said policy, but the said defendant, as soon as it learned the falsity of said fraudulent representations, to wit, on the 4 day of October, 1910, rescinded said contract of reinstatement and tendered to this plaintiff, on the 8 day of October, 1910, all of the premiums received from the said Arthur G. Snavelly, and which tender was, by the said plaintiff, refused, and the said defendant now brings the said premiums into Court for the said plaintiff to abide the further order and action of this Court, and asks the Court to cancel and annul the said contract of reinstatement induced to be executed by the said Arthur G. Snavelly falsely and fraudu-

lently as aforesaid. That this defendant discovered the falsity of said fraudulent representations as soon after the said reinstatement as it could, under the circumstances, by the exercise of ordinary care and diligence.

WHEREFORE, the defendant asks that said policy be cancelled and held for naught, and that the plaintiff take nothing herein, and for such other relief as to the Court may seem just and equitable and for costs of suit.

MILLER & O'CONNOR,
Attorneys for Defendant.

State of Montana,
County of Park,—ss.

James F. O'Connor, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and as such attorney makes this verification for and in behalf of the defendant. That he has read the foregoing answer, knows the contents thereof and that the same is true to the best of his knowledge, information and belief. Affiant further says that he makes this verification for and in behalf of the defendant, for the reason that no officer of the corporation, the defendant in the above-entitled action, is within Park County where this affiant is and resides.

JAMES F. O'CONNOR,

Subscribed and sworn to before me this 13th day of April, 1911.

[Seal]

H. J. MILLER,
Notary Public for the State of Montana, Residing at
Livingston, Montana.

My commission expires on the 14th day of Nov.
1911.

Filed April 17, 1911. Geo. W. Sproule, Clerk.
[11]

And thereafter, on Aug. 15, 1911, plaintiff filed her
Replication herein, which is in the words and
figures following, to wit:

*In the Circuit Court of the United States, Ninth
Circuit, District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COM-
PANY OF KANSAS CITY, MO.,

Defendant.

Replication.

Now comes the plaintiff and replying to the answer
of the defendant admits, alleges and denies as fol-
lows:

I.

Plaintiff admits that the policy of insurance on
which action is brought herein had lapsed for non-
payment of premium, and admits that the said policy
was reinstated by defendant company on the sixth
day of March, 1909.

II.

That except as above admitted, plaintiff denies
each and every allegation, matter and thing in the
answer of defendant contained.

WHEREFORE, having fully replied to the an-
swer of the defendant, the plaintiff prays judgment
as asked for in her complaint herein.

E. M. NILES,
Attorney for Plaintiff.

Due and personal service of the above Replication and a copy thereof admitted this the 14th day of August, 1911.

MILLER & O'CONNOR,
Attorneys for Defendant.

State of Montana,
County of Park,—ss.

Esta M. Snavely, being first duly sworn, on oath deposes and says: That she is the plaintiff in the foregoing action. That she has read the foregoing replication and knows the contents thereof and that the same is true.

ESTA M. SNAVELY.

Subscribed and sworn to before me this 14th day of Aug., 1911.

[Seal] E. M. NILES,
Notary Public for Montana, Residing at Livingston,
Mont.

My commission expires Aug. 3, 1912.

Filed Aug. 15, 1911. Geo. W. Sproule. Clerk.
[12]

And thereafter, on May 31, 1912, the verdict of the jury was rendered and entered herein, being as follows, to wit:

In the District Court of the United States, District of Montana.

ESTA M. SNAVELY,

Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled action, find the issues in favor of the plaintiff, and assess her damages in the sum of Five Thousand Dollars (\$5,000), with interest thereon at the rate of eight per cent per annum from the 2d day of September, 1910.

FRED W. HILL,
Foreman.

Filed May 31, 1912. Geo. W. Sproule, Clerk.
[13]

And thereafter, on June 11, 1912, Judgment was duly entered herein, in the words and figures following, to wit:

United States District Court, District of Montana.
No. 1041.

ESTA M. SNAVELY,
Plaintiff,

vs.

THE GREAT WESTERN LIFE INSURANCE
CO., a Corporation,
Defendant.

Judgment on Verdict.

This action came on regularly for trial on May 31, 1912; the said parties appeared by their attorneys, E. M. Niles and Fred L. Gibson, counsel for plaintiff, and Miller & O'Connor, counsel for defendant. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of the plaintiff were sworn and examined. After hear-

ing the testimony of plaintiff's witnesses and the arguments of counsel, the Court directed the jury to return a verdict for the plaintiff in the sum of Five Thousand Dollars, with interest, whereupon the jury returned to the Court a verdict for the plaintiff, Esta M. Snavelly, and against the defendant, The Great Western Life Insurance Co., for the sum of Five Thousand Dollars, with interest thereon at the rate of eight per cent per annum from the 2d day of September, 1910.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, Esta M. Snavelly, do have and recover from the defendant, The Great Western Life Insurance Company, the sum of Five Thousand Seven Hundred Dollars, together with plaintiff's costs in this action taxed at the sum of \$98.80.

Judgment entered this 11th day of June, 1912.

GEO. W. SPROULE,

Clerk. [14]

[Certificate to Judgment-roll.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 11th day of June, A. D. 1912.

[Seal]

GEO. W. SPROULE,

Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed June 11, 1912. Geo. W. Sproule, Clerk.
[15]

And thereafter, on August 8th, 1912, defendant's bill of exceptions, as settled and allowed, was duly filed herein, being in the words and figures following, to wit: [16]

[Bill of Exceptions.]

In the District Court of the United States, District of Montana.

No. 1041.

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COMPANY,

Defendant.

APPEARANCES:

For Plaintiffs: Messrs. E. M. NILES, FRED L. GIBSON.

For Defendant: Messrs. MILLER & O'CONNOR.

Due timely and legal service of the within Bill of Exceptions and receipt of a true copy thereof is hereby acknowledged this 29th day of July, 1912.

E. M. NILES,

FRED L. GIBSON,

Attys. for Plaintiff. [17]

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable George M. Bour-

guin Judge of the said court, sitting with a jury, duly called, empaneled and sworn to try said cause, on the 31st day of May, 1912, at the courtroom of said court in the city of Helena, Montana; that the plaintiff was represented by Messrs. E. M. Niles and Fred L. Gibson; and that the defendant was represented by Messrs. Miller & O'Connor; whereupon the following proceedings were had and evidence introduced, to wit:

[Testimony of Esta M. Snavelly, the Plaintiff, in Her Own Behalf.]

ESTA M. SNAVELLY, duly called and sworn as a witness in her own behalf, testified as follows:

Direct Examination.

(By Mr. NILES.)

Q. You may state your name to the Court and jury. A. Esta M. Snavelly.

Q. Where do you reside, Mrs. Snavelly?

A. Livingston, Montana.

Q. And how long have you lived down there?

A. I came to Montana in 1907.

Q. How old are you, Mrs. Snavelly?

A. Thirty years.

Q. And what, if any, children do you have, Mrs. Snavelly? A. Two children, a boy and a girl.

Q. What is their age? A. Three and four.

Q. Are you the widow of Dr. A. G. Snavelly, deceased? A. Yes, sir. [18]

Q. And where and when were you married, Mrs. Snavelly? A. In Ohio,—Canton, Ohio, 1905.

Q. What was your husband's profession, Mrs. Snavelly? A. Dentist.

(Testimony of Esta M. Snavelly.)

Q. When did your husband, Mr. A. G. Snavelly, die? A. July 3d, 1910.

Q. At Livingston? A. Yes, sir.

Q. I will ask you, Mrs. Snavelly, whether your husband had a policy of insurance in any life insurance company at the time of his death? A. He did.

Q. And did he have a policy in the Great Western Life Insurance Company, if you know?

A. Yes, sir.

Q. About when, if you know, was this policy taken out, Mrs. Snavelly?

A. He received the policy some time in January, 1908.

By Mr. MILLER.—We object to the question, for the reason that the pleadings admit the issuance of the policy at the time it was issued.

(Objection overruled. Exception noted.)

Q. Some time in January, 1908. A. Yes, sir.

(Document handed to the reporter by Mr. Niles and marked for identification Plaintiff's Exhibit "A.")

Q. Mrs. Snavelly, is that the insurance policy?

A. Yes, sir, it is.

Q. And in whose possession was that insurance policy [19] at the time of the insured's death?

A. In my possession.

Q. And what, if anything, did you do with it after his death? A. I took it to Mr. Niles.

By Mr. NILES.—We offer in evidence Plaintiff's Exhibit "A."

By Mr. O'CONNOR.—No objection.

Whereupon said Plaintiff's Exhibit "A" was admitted in evidence, and is as follows, to wit: [20]

The Great Western Life Insurance Company.

Kansas City, Mo.

By this Contract of Insurance

Agrees to pay FIVE THOUSAND Dollars
at the Home Office of the Company, in Kansas City, Missouri, as follows:

THE

To ESTA M. SNAVELY

BENEFICIARY

-WIFE-

of the insured, immediately on approval of proofs of the death
of the insured during the continuance of this contract.

THE

ARTHUR G. SNAVELY of LIVINGSTON

INSURED

County of PARK State of MONTANA

This Contract is issued on the Guaranteed Annual Dividend plan, and if kept in force by payment of premiums in cash, the Company guarantees that such dividends shall be as shown on the Coupons hereto attached.

If the insured shall elect to pay all premiums in full, without reduction, and leave with the Company the dividends represented by the Coupons on this contract, the Company guarantees that this contract will be fully paid-up after paying the premiums in cash for FIFTEEN full years and delivering all attached Coupons to the Company.

In case the insured should elect to leave the Coupons to make this a fully paid-up policy in FIFTEEN years and should die while this contract is in force, but before it is fully paid-up as above provided, all of the Coupons bearing date prior to said death shall be paid to the beneficiary with compound interest at the rate of $3\frac{1}{2}$ per cent per annum in addition to the sum insured.

In case the insured shall not elect as above provided, but shall, nevertheless, leave said dividends with the Company, the same shall be payable, on presentation of the Coupons at any time, with compound interest at the rate of $3\frac{1}{2}$ per cent per annum for each full year such dividends are left with the Company.

STATE OF MISSOURI. INSURANCE DEPARTMENT.

This Policy is registered and secured by a pledge of bonds or deeds of trust on real estate deposited with this department.

Jefferson City, Mo., 190.....

By Copy
Deputy Supt.

Copy
Superintendent.

This Contract is absolutely Free from Conditions as to Residence, Occupation, Travel or Place of Death. No Premium or Extra Premium will be required for Military or Naval Service in time of war, or in time of peace.

PREMIUMS ON THIS CONTRACT WILL BE PAID BY THE COMPANY, IF INSURED IS WHOLLY DISABLED AS FOLLOWS:

After one full annual payment shall have been made, and before a default in the payment of any subsequent premium, if the Insured shall furnish satisfactory proof that he has been wholly disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby from life, from pursuing any and all gainful occupations, the Company, by an endorsement in writing upon this contract, will agree to pay for the Insured the premiums, if any, which shall thereafter become payable during the continuance of such disability. In any such case, premiums to paid shall not be a lien on this contract and the cash loans and the values of this contract, in the schedule as given below, shall increase in the same manner as if the premiums were being paid by the Insured. If, however, the Insured shall recover so as to be able to engage in any gainful occupation during the premium-paying period, the Company's obligation to pay the premiums shall cease and the Insured shall resume payment of premiums in accordance with this contract on the first premium due date following such recovery.

GRACE IN PAYMENT OF PREMIUMS

A grace of thirty days, during which this contract will remain in full force, will be allowed in the payment of all premiums except the first.

REINSTATEMENT OF CONTRACT

In case of default in the payment of any premium or interest, the Company will reinstate the contract at any time, if not previously surrendered for its cash value upon written application by the Insured to the Company at its Home Office with evidence of insurability satisfactory to the Company, payment of all premiums that would have been paid in the intervening time if no default had been made, with interest thereon at the rate of five per cent. per annum computed from the premium due date, and payment or reinstatement, with interest at like rate, of any indebtedness existing at the time of default.

GUARANTEED BENEFITS OF THIS CONTRACT

THIS CONTRACT IS AUTOMATICALLY NON-EXPIRABLE FROM DATE OF ISSUE

AUTOMATIC EXTENDED INSURANCE

If any premium shall not be paid on or before the date when due and if there be no indebtedness to the Company, this insurance will automatically continue from said due date to term insurance, during the term (including the period of grace) specified in Column 4 of the accompanying table. If there be an indebtedness to the Company, and if any premium shall not be paid on or before the date when due, an amount of insurance equal to the face of this contract less the total indebtedness will automatically continue from said due date as term insurance for the term (including the period of grace) which the excess of the cash value of the contract, if any, over the indebtedness will purchase at the then age of the insured according to the Company's present table of single premiums.

PAID-UP INSURANCE

Upon written request of the insured within six months of the due date and if there be no indebtedness, the Company will in lieu of the Assured's Extended Insurance, endorse to this contract the amount of paid-up insurance, if any, specified in Column 3 of the accompanying table.

If there be an indebtedness which shall be less than the cash value, the Company will endorse on this contract the amount of paid-up insurance equal to the excess of the cash value over the indebtedness; and the Insured will then purchase at the assured age of the insured and at the Company's present table of single payments.

CASH

Upon written request of the insured and surrender of this contract within six months of the due date, and if there be no indebtedness the Company will pay the amount of cash value, if any, specified in Column 2 of the accompanying table.

If there be an indebtedness the cash payable shall be the excess, if any, of cash value over the amount of the indebtedness.

LOANS

On demand in writing to the Home Office of the Company, the Insured may borrow on the sole security of this contract the amount specified in Column 1 of the accompanying table for the year in which the loan is to be taken, subject to interest, in advance, at the rate of 5 per cent. per annum; the contract shall be assigned to the Company as security according to the terms of the Company's loan agreement, and the Premiums on the contract shall be paid in full to the anniversary of the insurance year succeeding the date when the loan shall be made. The amount available at any time includes any previous loan then unpaid.

The Extended Term Insurance and Paid-up Insurance specified above shall not be subject to cash loans.

ANNUITY OPTION

At and of **TWENTY** years, if this contract is in full force and there shall be no indebtedness to the Company, upon surrender of this contract an annuity will be issued guaranteeing an annual income of **ONE HUNDRED FIFTY FIVE AND 00/100.00** Dollars to the Insured during his natural life, the first payment to be made on the **27TH** day of **DECEMBER**, 19**27**.

CHANGE OF BENEFICIARY

Provided this contract is not assigned, the Insured may, at any time and from time to time during its continuance, change the beneficiary, to take effect only when such change and the written consent of the Company thereto are indorsed upon the contract, or attached thereto, at the Home Office of the Company, whereupon all rights of the former beneficiary shall cease. If there be no beneficiary living at the death of the Insured, the proceeds of this contract shall be paid to the executors, administrators or assigns of the Insured.

GENERAL PROVISIONS

(1) No agent can make, alter or discharge this contract or extend the time for payment of premiums, nor can this contract be varied or altered or the conditions thereof or extended in any respect, except by the written agreement of the Company, signed by the President, one of the Vice-Presidents, Secretary or Assistant Secretary, whose authority will not be delegated. (2) If the age of the Insured was incorrectly stated in the application for this contract, the amount payable hereunder shall be the insurance which the actual premium paid would have purchased at the true age of the Insured. Age will be assumed on satisfactory proof. (3) If any premium shall not be paid on or before the date when due, the liability of the Company shall be only as hereinafter provided. (4) No assignment hereto shall be binding upon the Company unless made by an instrument in writing indorsed upon this contract or attached hereto, and unless a duplicate shall be furnished to the Company forthwith upon its execution. The Company shall not be held responsible for the validity of any such assignment. Any claim made under an assignment shall be subject to proof of interest and extent thereof. (5) Any indebtedness to the Company, including any balance of the premiums for the insurance year remaining unpaid, will be deducted in any settlement of the contract or of any benefit thereunder. (6) In case of suicide, committed while sane or insane, within one year from the date on which this insurance begins, the limit of recovery hereunder shall be the premium paid. (7) The reserve on this policy during the first year shall be computed as for first year term insurance.

PREMIUMS

This contract is issued in consideration of the application therefor, which application is made a part of this contract, and in further consideration of the sum of **ONE HUNDRED SIXTY FOUR AND 70/100.00** Dollars, to be paid in advance on the delivery of this policy, for one year's insurance from date hereof, and the further payment of a like amount, at the Home Office of the Company, at Kansas City, Missouri, on or before the **TWENTY-SEVENTH** day of **DECEMBER** in every year until annual premiums for **TWENTY** years, including the first year, have been paid.

THIS CONTRACT IS INCONTESTABLE AFTER ONE YEAR FROM DATE OF ISSUE.

EXPIRATION	LOAN VALUE	CASH VALUE	PAYD-UP INSURANCE	INSURANCE ACTUALLY CONTINUED FOR
YEAR	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4
1	\$ 130	\$ 130	\$ 525	1
2	\$ 200	\$ 130	\$ 790	2
3	\$ 275	\$ 200	\$ 1055	3
4	\$ 370	\$ 275		4
5	\$ 455	\$ 370		5
6	\$ 545	\$ 455		6
7	\$ 635	\$ 545		7
8	\$ 730	\$ 635		8
9	\$ 860	\$ 730		9
10	\$ 985	\$ 860		10
11	\$ 1100	\$ 985		11
12	\$ 1285	\$ 1100		12
13	\$ 1495	\$ 1285		13
14	\$ 1650	\$ 1495		14
15	\$ 1820	\$ 1650		15
16	\$ 1995	\$ 1820		16
17	\$ 2185	\$ 1995		17
18	\$ 2380	\$ 2185		18
19	\$ 2430	\$ 2380		19
20				PAID UP

Copy

DEC. 27TH #26

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

41.85

DEC. 27TH #23

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

40.35

DEC. 27TH #20

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

38.85

DEC. 27TH #17

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

37.35

DEC. 27TH #14

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

33.75

DEC. 27TH #11

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

29.15

DEC. 27TH #25

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

41.35

DEC. 27TH #22

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

39.85

DEC. 27TH #19

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

36.35

DEC. 27TH #16

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

36.85

DEC. 27TH #13

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

32.20

DEC. 27TH #10

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

27.65

DEC. 27TH #08

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

24.65

DEC. 27TH #24

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

40.85

DEC. 27TH #21

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

39.35

DEC. 27TH #18

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

37.85

DEC. 27TH #15

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

35.30

DEC. 27TH #12

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

30.65

DEC. 27TH #09

Great Western Life Insurance Co.

with pay to the insured under POLICY # 8303
to the extent of the insurance if said policy is assigned

26.15

Copy Special Income

I

THE GREAT WESTERN LIFE INSURANCE COMPANY hereby agrees to apportion and pay to ARTHUR G. SNAVELY, the insured, annually during his life and thereafter to his beneficiary, a SPECIAL INCOME consisting of $\frac{1}{2}$ share of a SPECIAL INCOME FUND, which FUND shall be equivalent to Twenty-five Cents (\$0.25) per Thousand Dollars (\$1,000) of all insurance, except re-insurance, written by said GREAT WESTERN LIFE INSURANCE COMPANY in the United States and all foreign countries during

FIFTY (50) YEARS

from November 1, 1907, to November 1, 1957, on which premiums computed on the annual basis have been received in cash by the Company, and for so long thereafter as such premiums are received on such insurance; said SPECIAL INCOME to be determined as follows:

II

Said SPECIAL INCOME FUND shall be ascertained in January for each preceeding year, and such sum divided by

FIFTEEN HUNDRED

less the number of shares lapsed by non-payment of premiums or terminated by the death of beneficiaries; the quotient obtained shall be the apportionment to each of such shares, payable upon the succeeding anniversary of this policy, subject to the payment of the regular required premium on this policy. Each policy of Ten Thousand Dollars (\$10,000) shall represent one share and policies of less denomination shall represent a proportionate part thereof.

III

It is understood and agreed that in consideration of the SPECIAL INCOME paid hereunder, the insured will, upon written request, advise the Company as to the fitness and desirability of agents and applicants for agencies, and furnish, confidentially, such information as he may possess regarding the personal habits of applicants for insurance and those of lapsed policyholders who apply for re-insatement, which might assist in protecting the Company from fraudulent or false claims or fraudulently acquired insurance.

for testimony as to the special income of (hereinbefore)
insured the conditions of this policy as to payment of premium
having been complied with shall be MY WIFE
ESTA M. SNAVELY of

IN WITNESS WHEREOF, The Great Western Life Insurance Company has caused this instrument to be signed by its President and Secretary at the Home Office of the Company, at Kansas City, Missouri, this TWENTY-SEVENTH day of DECEMBER 19 07

E. J. C. C. C. C.

Secretary

O. L. C. C. C.

President

Examined and Countersigned by

THE PROCEEDS OF THIS CONTRACT MAY BE PLACED IN TRUST TO SECURE A GUARANTEED ANNUAL INCOME.

The proceeds of this contract, if in excess of \$1000, may be placed in trust with the Company for one of the following purposes:—

- (1.) To pay to the insured or annuitant, if the proceeds income payable during his lifetime, an annual life income or an annual income limited to a period of years according to the accompanying tables; or
- (2.) To pay to the insured or annuitant during the continuance of the trust, the interest on such proceeds, or the part thereof remaining with the Company, at the rate of 3 1/4 per cent. per annum; such proceeds, or the remainder thereof, to be returned at the termination of the trust or the death of the annuitant; or
- (3.) To pay to the Beneficiary or annuitant, from the time when the proceeds are payable, an annual life income or an annual income limited to a period of years, according to the accompanying tables; or
- (4.) To pay to the Beneficiary or annuitant, during the continuance of the trust, the interest on such proceeds, or the part thereof remaining with the Company, at the rate of 3 1/4 per cent. per annum; such proceeds, or the remainder thereof, to be returned at the termination of the trust or the death of the annuitant.

If the trust is created by the insured for the benefit of the Beneficiary, the Beneficiary cannot assign or mortgage the proceeds in life or limited income, nor, if the proceeds are placed in trust subject to interest, mortgage such proceeds to anticipate the interest, unless such right is given by the insured in writing and is indorsed upon this contract by the Company at its Home Office during the life time of the insured.

If the trust is created by the insured for his own benefit, the insured may at any time subsequently annuitize or assign the unpaid life or limited income, or at any time withdraw the said proceeds in any part thereof remaining unpaid with accrued interest.

If the trust is created by the Beneficiary, the Beneficiary may at any time subsequently annuitize or assign the unpaid life or limited income, or at any time withdraw the said proceeds in any part thereof remaining unpaid with accrued interest.

No trust agreement shall be required or enforceable unless there be a writing subscribed by the Company at its Home Office and by the person creating such trust. Where a trust is created and a new one is not created, and no other provision is made for the proceeds of the insurance, payment shall be made as directed in the contract.

If the annuitant shall die before receiving all of the payments of life or limited income, the remainder thereof shall be made therefor in the proceeds, or mortgage, or assign of the annuitant, or if the proceeds are subject to annual interest only such proceeds in any part thereof remaining with the Company shall be paid to the executor, administrator or assigns of the annuitant.

The first payment of life or limited income shall be made as follows: Upon acceptance of satisfactory proof of death of the insured, where the insurance is payable at the death of the insured; or upon the creation of the trust where the proceeds are payable to the insured and the insured is not yet of age, or where the trust is created by the Beneficiary.

The first payment of interest shall be made one year from the date of the acceptance of proof of death, where the insurance is payable at the death of the insured; or one year from the date of the creation of the trust, where the proceeds are payable to the insured and the insured is not yet of age, or where the trust is created by the Beneficiary.

Limited Income

Annual income limited to a period of years or to the death of the insured, payable in any part thereof at the discretion of the insured or annuitant.

Period of Years	Amount of Annual Income	Yield of Investment	Yield of Investment
5	\$214	\$1070	5 1/2
6	181	1056	5 1/4
7	158	1106	5 1/2
8	140	1120	5 1/4
9	127	1143	5 1/2
10	116	1160	5 1/4
11	107	1177	5 1/2
12	100	1200	5 1/4
13	94	1222	5 1/2
14	88	1232	5 1/4
15	84	1260	5 1/2
16	80	1280	5 1/4
17	76	1292	5 1/2
18	73	1314	5 1/4
19	70	1330	5 1/2
20	68	1360	5 1/4
21	65	1365	5 1/2
22	63	1386	5 1/4
23	61	1403	5 1/2
24	60	1430	5 1/4
25	58	1450	5 1/2
26	57	1482	5 1/4
27	55	1485	5 1/2
28	54	1512	5 1/4
29	53	1537	5 1/2
30	52	1569	5 1/4

Life Income

Annual income to be paid for the life of the insured or annuitant, payable in any part thereof at the discretion of the insured or annuitant.

Period of Years	Amount of Annual Income	Yield of Investment	Yield of Investment
5	\$214	\$1070	5 1/2
6	181	1056	5 1/4
7	158	1106	5 1/2
8	140	1120	5 1/4
9	127	1143	5 1/2
10	116	1160	5 1/4
11	107	1177	5 1/2
12	100	1200	5 1/4
13	94	1222	5 1/2
14	88	1232	5 1/4
15	84	1260	5 1/2
16	80	1280	5 1/4
17	76	1292	5 1/2
18	73	1314	5 1/4
19	70	1330	5 1/2
20	68	1360	5 1/4
21	65	1365	5 1/2
22	63	1386	5 1/4
23	61	1403	5 1/2
24	60	1430	5 1/4
25	58	1450	5 1/2
26	57	1482	5 1/4
27	55	1485	5 1/2
28	54	1512	5 1/4
29	53	1537	5 1/2
30	52	1569	5 1/4

* If the annuitant is 50 years of age, 500 dollars, which the proceeds of the contract are payable, the amount of such annual income will be \$47.00 per each \$1000 of the proceeds; if the annuitant is 55 years of age, 400 dollars, which the proceeds of the contract are payable, the amount of such annual income will be \$37.60 per each \$1000 of the proceeds; if the annuitant is 60 years of age, 300 dollars, which the proceeds of the contract are payable, the amount of such annual income will be \$28.20 per each \$1000 of the proceeds; if the annuitant is 65 years of age, 200 dollars, which the proceeds of the contract are payable, the amount of such annual income will be \$18.80 per each \$1000 of the proceeds; if the annuitant is 70 years of age, 100 dollars, which the proceeds of the contract are payable, the amount of such annual income will be \$9.40 per each \$1000 of the proceeds.

The Great Western Life Insurance Co.

— Kansas City, Mo. —

No. -5303-

-ARTHUR G. SNAVELY-

Age-27-

Amount \$ 5,000.-

Annual Premium \$ 124.70

Twenty Payment Life

Guaranteed Annual Dividends
NON-PARTICIPATING

Copy

In event of death, notice should be given immediately to the Company at Kansas City, Missouri.
It is not necessary for the insured or the Beneficiary to employ any person to collect any benefit provided in this contract. Time and expense will be saved by writing direct to the Company or its agent.

Kansas City, Missouri.

RECEIVED OF THE GREAT WESTERN LIFE INSURANCE COMPANY

DOLLARS

now terminated by

In full for all claims under this Policy No.

In presence of

(Testimony of *Esta M. Snavelly*.)

Q. Mrs. Snavelly, I will ask you, with reference to the payments of the premiums,—do you know whether the insured, your husband, paid the premiums due on this policy? A. He did.

Q. And do you know whether he received any receipt for the payment he made? A. Yes, sir.

(Three papers handed to the reporter by Mr. Niles and marked for identification Plaintiff's Exhibit "B," "C" and "D," respectively.)

Q. Mrs. Snavelly, look at those papers and tell me whether those are the receipts. A. They are.

By Mr. NILES.—Plaintiff offers in evidence her Exhibits "B," "C" and "D."

By Mr. O'CONNOR.—No objection.

(Whereupon said Exhibits "B," "C" and "D" were admitted in evidence, and are as follows, to wit:)

Plaintiff's Exhibit "B."

Office of
THE GREAT WESTERN LIFE INSURANCE
COMPANY.

Kansas City, Missouri.

Number 8172.

Amount \$164.70.

Received of Arthur G. Snavelly of Livingston, Mont., the sum of one hundred sixty-four and 70/100 dollars (\$164.70), being the first annuam premium on policy No. 8303, for \$5000.

This receipt to be valid must be signed by the president or secretary, and countersigned by an authorized agent of the company. [21]

E. L. BIERSMITH,
Secretary.

Countersigned this 31 day of December, 1907.

CHAS. H. RHODES,
Agent.

Plaintiff's Exhibit "C."

EVERY POLICY SECURED BY A DEPOSIT OF ITS FULL CASH
VALUE WITH THE STATE OF MISSOURI.

Office of

THE GREAT WESTERN LIFE INSURANCE
CO.

Kansas City, Missouri.

20 P. G. D.

Received, the annual premium of \$164.70
on Policy No. 8303 for \$5000, due December 27, 1908,
on the life of

Arthur G. Snavelly, Read
Livingston, Montana. notice
 on
 back

This receipt to be valid, must be signed by presi-
dent or secretary.

E. L. BIERSMITH,
Secretary.

Countersigned:

J. R. KRUSE,

Cashier.

DIVIDENDS USED TO PAY PREMIUM.

Paid as follows:

Premium	\$164.70
Special Income \$.40	
Coupon No. 1 \$24.65	\$ 25.05
	<hr/>
Cash due	\$139.65

Paid Mar. 5, 1909.

(Notice on back:)

Should this policy be restored at any time by acceptance [22] of premium, AFTER the same is due and payable, such restoration shall not create an obligation or precedent for waiving any conditions of the Policy in regard to subsequent non-payment of any premium on the day it falls due. The insured, by the acceptance of this receipt, agrees to this condition.

Plaintiff's Exhibit "D."

EVERY POLICY SECURED BY A DEPOSIT OF ITS FULL CASH
VALUE WITH THE STATE OF MISSOURI.

Office of

THE GREAT WESTERN LIFE INSURANCE
CO.

Kansas City, Missouri.

20 P. G. D.

Received, the annual premium of \$164.70
on Policy No. 8303 for \$5000, due Dec. 27,
1909, on the life of

Arthur G. Snavelly,
Livingston, Montana.

Read
notice
on
back

This receipt to be valid, must be signed by president or secretary.

JAMES CHAPPELLE,

Secretary.

Countersigned:

J. R. KRUSE,

Cashier.

(Testimony of Esta M. Snavelly.)

DIVIDENDS USED TO PAY PREMIUM.

Paid as follows:

Premium... ..	\$164.70
Special Income.... ..\$ 6.40	
Coupon No. 2.....	\$26.15 32.55
	<hr/>
Cash due.....	\$132.15

Dec. 31, PAID. [23]

(Notice on back:)

Should this policy be returned at any time by acceptance or premium, AFTER the same is due and *apayable*, such restoration shall not create an obligation or precedent for waiving any conditions of the policy in regard to subsequent non-payment of any premium on the day it falls due. The insured, by acceptance of this receipt, agrees to this condition.

Q. Do you know, Mrs. Snavelly, how these receipts were received? A. Through the mail.

Q. After the death of the insured, Mrs. Snavelly, what, if anything, was done, to your knowledge, with reference to notifying the company of his death?

A. A death certificate was made out and sent to them.

Q. How long after his death was it,—the proof of loss that you made?

A. Ten or fifteen days.

Q. Do you know, Mrs. Snavelly, who sent the notice and proof? A. I do.

Q. Who did? A. Dr. Beeson.

Q. Do you know, Mrs. Snavelly, whether the company received the notice of death and proof of the

(Testimony of Esta M. Snavely.)

claim? A. I do.

Q. You say they did receive it? A. Yes, sir.

Q. Has settlement,—payment,—ever been made on this [24] policy, Mrs. Snavely? A. No, sir.

Cross-examination.

(By Mr. MILLER.)

Mrs. Snavely, will you examine this letter (handing letter to witness) and tell me whose signature that is, if you know?

A. It is my husband's signature.

Q. The insured? A. Yes, sir.

Q. You received a communication from the company in relation to the proof of loss, did you?

A. Yes, sir.

Q. Did you have the death proofs made by Dr. Beeson?

A. The blanks were filled out by Dr. Beeson.

Q. You know nothing about the contents of those blanks, do you? A. No.

Q. Did you meet a representative of the company by the name of Thompson in Mr. E. M. Niles' office, after the proofs of death had been sent in,—in Livingston, Montana?

A. I don't remember the name. I met their representative there.

Q. Did he or did he not tender you on behalf of the company the money that had been paid by your deceased husband as a premium in connection with the insurance policy?

By Mr. GIBSON.—That is objected to, as it would be incompetent, irrelevant and immaterial to tender

(Testimony of E. M. Niles.)

the return [25] of the premiums after the death of the insured.

By the COURT.—It would not be proper cross-examination anyway. Objection sustained.

(Exception noted.)

(At this time it was agreed between counsel for the respective parties, on the suggestion of the Court, that the policy, Plaintiff's Exhibit "A," should be considered as having been read to the jury.)

(Witness excused.) [26]

[Testimony of E. M. Niles, for Plaintiff.]

E. M. NILES, duly called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GIBSON.)

Q. State your name. A. E. M. Niles.

Q. Your residence? A. Livingston, Montana.

Q. What is your occupation?

A. Attorney at law.

Q. Are you one of the counsel for the plaintiff in the case now on trial here? A. Yes, sir.

Q. Were you consulted by the beneficiary in this policy, Esta M. Snively, in regard to mailing notices of death and proofs of loss to the Great Western Life Insurance Company after the death of her husband in 1910?

By Mr. O'CONNOR.—Objected to as immaterial and irrelevant, without any issues in the case.

(Objection overruled. Exception noted.)

A. Yes, sir.

Q. At the request of the plaintiff in this case, did

(Testimony of E. M. Niles.)

you mail to the Great Western Life Insurance Company a notice that Arthur G. Snavely had died?

A. I did. I mailed the notice of his death.

Q. Did you receive from the company a reply to the notice that you sent them of his death?

A. I received a notice in reply, yes, sir. [27]

(Paper handed to the reporter by Mr. Gibson and marked for identification Plaintiff's Exhibit "E.")

Q. I now hand you plaintiff's exhibit and ask you what that is?

A. That is a letter I received from the company in reply to my notice of proof of death and asking them for proof blanks.

By Mr. GIBSON.—We now offer Plaintiff's Exhibit "E" in evidence.

By Mr. O'CONNOR.—No objection.

(Whereupon said Plaintiff's Exhibit "E" was admitted in evidence, and is as follows:)

Plaintiff's Exhibit "E."

**THE GREAT WESTERN LIFE INSURANCE
CO.**

Office of Auditor.

Kansas City, Mo., July 15, 1910.

Re Policy No. 830—Arthur G. Snavely (Deceased).

Mr. E. M. Niles,

Livingston, Montana.

Dear Sir:—

We are in receipt of your letter of the 11th inst., notifying us of the death of the above party. Enclosed find "Proof or Death" blanks which kindly

(Testimony of E. M. Niles.)

have filled out at your earliest convenience. Claimant's statement is to be made out by the beneficiary, Esta M. Snavely. Kindly see that all of the information asked for is properly given, have all signatures witnessed before Notary Public, and be sure to attach certificate given by the clerk of the Court of Record, which certifies as to the authority of the Notary to act, [28] the genuineness of his signature, etc. Upon receipt of completed proofs, same will be given prompt attention.

Yours very truly,
J. R. KRUSE,
Auditor.

Q. Did you cause to be made out the blanks of proofs of death referred to in that communication, Mr. Niles? A. I did, sir.

Q. And did you cause them to be forwarded to the Great Western Life Insurance Company?

A. I mailed them to them.

Q. Did you receive any acknowledgment of the receipt of the proofs of death?

A. I received a communication from the company to that effect.

(Paper handed to the reporter by Mr. Gibson and marked Exhibit "F.")

By Mr. O'CONNOR.—No objection.

(Whereupon said Plaintiff's Exhibit "F" was admitted in evidence, and is as follows:)

(Testimony of E. M. Niles.)

Plaintiff's Exhibit "F."

**THE GREAT WESTERN LIFE INSURANCE
CO.**

Office of Auditor.

Kansas City, Mo., September 2, 1910.

Mr. E. M. Niles, Attorney. [29]

Livingston, Montana.

Dear Sir:—

We wish to acknowledge receipt of proofs of death of Arthur G. Snavely, but owing to information that we have received in reference to this case, we shall be obliged to delay the settlement of this matter until we are satisfied. We shall use due diligence.

Yours very truly,

J. R. KRUSE,

Auditor.

Cross-examination.

(By Mr. MILLER.)

Q. If you know who it was that swore Dr. Beeson to the medical proof of loss, you may state.

By Mr. GIBSON.—We object to that as not proper cross-examination.

By the COURT.—What does the policy call for with respect to notice and proof of death?

By Mr. GIBSON.—Does not call for proof, your Honor.

By Mr. MILLER.—I think we will connect it up.

By the COURT.—I don't think that that would be material, Mr. Miller.

A. I don't remember.

By the COURT.—I suppose the proof shows for

(Testimony of E. M. Niles.)

itself, does it not?

Q. I will ask you, if you know, whose signature that is, showing you the claimant's statement on proof of loss? A. That is J. B. Beeson's. [30]

Q. Dr. Beeson's? A. I think so, yes, sir.

Q. Whose signature is this?

A. That looks very much like mine.

Q. I will ask you to examine this document and state whether you ever saw it before.

A. A good deal of my writing on there, Mr. Miller. I have seen the document before.

Q. Is that the claimant's statement that was caused to be made out by Mrs. Snively, and that you made out in connection with Dr. Beeson and Richard Brown, T. J. Thelan and S. M. Grigsby, and caused to be forwarded to the company?

A. That is the claimant's statement.

Q. It is the one that you caused to be forwarded to the company, is it? A. That is the one, yes, sir.

Q. Mr. Niles, were you acquainted with Arthur G. Snively during his life time? A. Yes, sir.

Q. Had you frequently seen his signature?

A. Yes, sir.

Q. I will ask you to examine the signature on this paper, purporting to be certificate of health and renewal contract, and state if you know whose signature that is.

By Mr. GIBSON.—That is objected to as not proper cross-examination.

By the COURT.—He may identify the signature for the purpose of use later.

(Testimony of E. M. Niles.)

A. I think, Mr. Miller that is the insured's signature.

Q. You would be willing to state that it was, would you? [31]

A. Why, it resembles it. I think that is his signature. I would not swear positively.

(Witness excused.)

By Mr. GIBSON.—The plaintiff rests. [32]

[Testimony of Hal Van Doren, for Defendant.]

HAL VAN DOREN, duly called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. You may state your name.

A. Hal Van Doren.

Q. Where do you reside?

A. Livingston, Montana.

By Mr. GIBSON.—We would like to make an objection at this time. The plaintiff objects to the introduction of any evidence to establish the allegations of fraud and fraudulent representations contained in the answer, as having been made in the application for the policy and the application for reinstatement, upon the ground and for the reason that the policy of insurance in evidence in this case contains the provision that this contract is incontestible after one year from date of issue, and that more than two years had elapsed from the date of the issuance of the policy until the death of the insured, and that more than one year had elapsed from

the date of the issuance of the policy or the reinstatement of the policy until the death of the insured.

(After argument on the objection by counsel, the Court took the matter under advisement until two o'clock.) [33]

**[Proceedings Had] Friday, May 31, 1912, 2 P. M.—
Opinion on Objection to Admission of Certain
Proof.]**

By the COURT.—In ruling on the objection to the admission of any proof on the part of the defendant to support its allegations of falsity and fraud on the part of the insured in his application for reinstatement of this contract or policy, the Court will say that in the policy or the contract here involved the company agrees, first, that though for default in payment of premiums the insured would automatically forfeit the larger part of the benefits of the contract, yet the insurer, the company, would fully reinstate the contract at any time that the insured made written application therefor, together with evidence of his insurability satisfactory to the insurer, and the payment of all premiums in default with interest; and second, the company agreed that the contract would be incontestible after one year from the date of issuance. The insured did default in the payment of the premiums, and thereafter made written application for reinstatement of the contract, wherein he recited that he was in good health and free from every ailment and complaint; that there had been no change in family history; that he had no sickness nor ailment of any kind, nor been at-

tended by a physician, other than that he had had an operation for appendicitis and had entirely recovered therefrom. The insured also added in his application for reinstatement that he renews the statements and agreements contained in the original application, and expressly agrees that if any answer or statement contained therein, or if any statement contained in the application for reinstatement be untrue in any respect, then the policy is and shall continue [34] to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. Upon receipt of that, apparently, the contract, the policy, was reinstated, and all premiums, undoubtedly, paid, as appears from the evidence, and that would be the presumption in the absence of any proof to the contrary. In my opinion, the reinstatement of the policy revived and set in action all the terms and conditions thereof. I think that would be conceded, that would mean not only the obligation on the part of the company to pay so much insurance money to the beneficiary if the insured died, and not only upon the part of the insured to pay his premiums, but it also revived the promise of the company that the policy will be incontestible after one year from date of issuance. If the contract reinstated is to be viewed as a new contract, taking effect as of the date of reinstatement, such date is the date of issue, within the meaning of the incontestible clause, one year after which the contract would again become incontestible for any reason. This incontestible clause contains absolutely no exception. The policy is invulnerable to any attack

that the company might make upon it, except the failure to pay the premiums, which, of course, is not plead here, and, apparently, there was no failure after the reinstatement. It is maintained by all the cases, so far as I have been able to find, that the incontestible clause cuts off the defense of fraud or falsity on the part of the insured in procuring the policy originally when the time limited has run, and it seems to me that the same principle must apply in reference to the reinstated contract. The contract is the same. It contains the same terms and conditions, including the same incontestible [35] clause, which latter is, of course, revived with the reinstatement of the contract, and, as the Court holds, begins to run against falsity or fraud by the insured in inducing the new or reinstated contract, from the date of such reinstatement. This also seems to be upheld by the Galbraith Case, 115 Tenn. 471, which is the only case squarely on the point which has been submitted to me. But upon principle, I can see no reason why it would not apply, if this was a new contract, on the reinstatement,—and I do not believe it is, because the original contract had never been absolutely abrogated and a nullity. But if it is a new contract, or a revived contract, it is a new, or revived contract with the incontestible clause in it, and it must serve the same purpose in the new or revived contract that it did serve, for falsity or fraud, if any, in procuring the contract originally. This incontestible clause, of course, is a very valuable part of the contract, and is put there by the insurance company as an inducement to men to accept insurance. They

have, by reason of that clause, the assurance that after their policy has lived so long and they have kept up their premiums, if they should die or live, and especially if they should die, their beneficiaries will not be confronted with a defense of fraud or false statements, when their mouths are closed by death. Hence, it furnishes a great inducement for men to enter into engagements with the insurance company. The fact that the application for reinstatement contains the condition that the reinstatement shall be null and void and of no effect if the warranty and representations be untrue, is, as I view it, immaterial, for it is absurd to hold that the parties intended that the [36] contract was never of force because of falsity and fraud, and yet they proceeded to incorporate an incontestible clause under which, when the time limit had expired, falsity and fraud would be no defense. A case somewhat like this is *Mutual Reserve Fund Life Association vs. Austin*, 142 Fed. 398. There it was originally agreed between the parties that the policy would be of no force or effect unless, when it was delivered to the insured, he was in good health. But it had in it an incontestible clause cutting off all defenses after three years, so far as fraud is concerned. And it was maintained in that case by the insurance company that, in view of the agreement that the policy would never be in effect unless delivered when the insured was in good health,—and it was conceded that it was delivered when he was not in good health,—the policy never became a binding contract, for failure of condition precedent. I notice that where that case is

reported in the L. R. A., it is said that is the first time the defense was ever made. However, the Circuit Court of Appeals refused to consider that a valid defense on the part of the insurance company, and held that, under the conditions inserted by the parties, it did become effective on delivery and set in motion the incontestible clause, to cut off all defenses based upon fraud and falsity after a certain term. Again, the Court views these warranties and conditions here as *nudum pactum*. Under the contract, it was to be reinstated upon written application, with evidence of insurability satisfactory to the company. Nothing further could be exacted by the insurer, and if the insurer did exact anything further, or if the insured voluntarily furnished anything further, it binds him and his [37] beneficiaries not at all. The original contract relieved the insured of any obligation to do anything but to furnish satisfactory evidence of his insurability. He did furnish that evidence, and, of course, presumptively, to the satisfaction of the company, as they acted upon it. But he also furnished these warranties and conditions, for violation or falsity of which the reinstatement was to be null and void. Being voluntary and without consideration, they cannot be availed of by the company as a defense here. Of course, it will be observed that if they were binding and untrue, they would serve to defeat reinstatement, however honestly and in good faith believed to be true when made by the insured. I observed this morning that it was immaterial whether they were warranties or whether they were not warranties, but mere representations,

for whether they were honestly made and believed in by the insured, or whether they were falsely and fraudulently made for the purpose of deceiving the company, they were equally binding, and, if untrue, would render the policy void. They virtually rise to the dignity of warranties. With reference to section 5593 of the Revised Statutes of Montana, I am not prepared to say it has any application here. While it would apply to the original contract, yet the original policy is supplemented by an application for reinstatement. And I think the application would be admissible in spite of that section of the Revised Statutes, if otherwise permissible, and not cut off by virtue of the incontestible clause. Since more than one year elapsed between the reinstatement of the policy—contract—and death of the insured before any attack or defense for fraud or falsity was made thereon by the insurer, I am of [38] the opinion such attack or defense is cut off and barred by the incontestible clause in the contract. And the objection to the admission of any evidence of falsity or fraud in the application for reinstatement is sustained.

(Exception noted.)

**[Motion for Judgment on Pleadings and Order
Denying Motion.]**

By Mr. O'CONNOR.—Now, if the Court please, this practically puts an end to the case. The defendant moves the Court for judgment on the pleadings, for the reason that the plaintiff is seeking to recover wholly upon the policy as issued originally, and not upon the policy together with the contract of rein-

statement, both of which constitute the plaintiff's cause of action.

By the COURT.—I am inclined to look upon the contract which, in some of its parts, was terminated, but which became fully alive when it was reinstated. It is my recollection that it is the settled practice in this State, if there is a departure in the reply from the complaint, that it must be taken advantage of before the trial. The motion will be denied.

(Exception noted.)

**[Motion for a Directed Verdict, etc., and Order
Denying Motion of Defendant.]**

By Mr. GIBSON.—The plaintiff at this time moves the Court to direct the jury to find a verdict for the plaintiff, in the amount of the policy, five thousand dollars, together with interest thereon at the rate of eight per cent per annum from the 3d day of July, 1910.

By the COURT.—I think it would carry interest from the time you furnished the proofs.

By Mr. O'CONNOR.—I wish to make another motion—

By Mr. GIBSON.—I will amend that to make it—

By Mr. O'CONNOR.—We ask the Court to instruct the jury [39] to return a verdict for the defendant, for the reason that the plaintiff has wholly failed to offer any evidence to the effect that proofs of death were furnished the defendant company, as was required by the terms of the policy.

By the COURT.—My recollection is, and I think the witness, Mr. Niles himself, testified to sending on the proofs and getting a written acknowledgment.

What is the date of that acknowledgment?

By Mr. GIBSON.—September 2d, 1910.

By the COURT.—The motion of the defendant will be denied.

(Exception noted.)

[Order Granting Motion to Direct Jury to Render Verdict for Plaintiff.]

By the COURT.—The motion to direct the jury to render a verdict in favor of the plaintiff and against the defendant for five thousand dollars, with interest thereon from the 2d day of September, 1910, at the rate of eight per cent per annum, is granted.

(Whereupon the Court instructed the jury to find a verdict for the plaintiff and against the defendant, and such verdict was thereupon returned by the jury.)

To which direction defendant excepted.

[Order Allowing, etc., Bill of Exceptions.]

The above and foregoing bill of exceptions, which contains all of the evidence and testimony given upon the trial of the above-entitled action, together with the rulings of the Court thereon and the exceptions taken to such rulings, and also all other proceedings had at the trial of the within action, is hereby allowed, signed, settled, approved and ordered by me to be filed and made a part of the record in said cause as defendant's bill of exceptions on motion for a new trial in the above-entitled action. I further certify

that the same is true and correct.

Dated this 8th day of Aug., A. D. 1912.

GEO. M. BOURQUIN,
Judge.

Filed Aug. 8th, 1912.

GEO. W. SPROULE,
Clerk. [40]

And thereafter, on Nov. 13, 1912, defendant's assignment of errors was duly filed herein, being in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

vs.

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

Assignment of Errors.

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, namely:

I.

The Court erred in sustaining the objections made by the plaintiff to the introduction of any evidence to establish the allegations of fraud and fraudulent representations contained in the answer as having been made in the application for the policy and the application for reinstatement to which ruling of the Court,

defendant duly excepted.

II.

The Court erred in denying the motion made by the defendant to instruct the jury to return a verdict for the defendant.

III.

The Court erred in denying the motion made by the defendant for judgment on the pleadings, to which ruling of the Court defendant duly excepted.

IV.

The Court erred in sustaining the motion made by the plaintiff to direct the jury to find a verdict for the plaintiff in the amount of the policy, namely Five Thousand (\$5,000) Dollars, together with interest, to which action of the Court defendant duly excepted.
[41]

V.

The Court erred in instructing the jury to find a verdict for the plaintiff and against the defendant for the sum named in the policy, to which action of the Court defendant duly excepted.

H. J. MILLER,

Attorney for Defendant.

Due timely and legal service of the foregoing and a receipt of a true copy is hereby acknowledged this 12th day of November, 1912.

E. M. NILES,

FRED L. GIBSON,

Attorneys for Plaintiff.

Filed Nov. 13, 1912. Geo. W. Sproule, Clerk.

[42]

And thereafter, on Nov. 13, 1912, petition for writ of error was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

versus

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

Petition for Writ of Error.

The above-named defendant, the Great Western Life Insurance Company, feeling itself aggrieved by the judgment of this Court made and entered herein on the 11th day of June, 1912, in favor of the plaintiff for the sum of Fifty-seven hundred ninety-eight 80/100 (5798.80) Dollars damages, comes now by H. J. Miller, its attorney, and petitions the said Court for a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also asks that an order be made fixing and allowing the amount of security which defendant shall give and furnish upon said writ of error.

H. J. MILLER,

Attorney for Defendant.

Due timely and legal service of the foregoing and a receipt of a true copy is hereby acknowledged this

12th day of November, 1912.

Petition granted.

E. M. NILES,
FRED L. GIBSON,
Attorneys for Plaintiff.
GEO. M. BOURQUIN,
Judge.

Filed Nov. 13, 1912. Geo. W. Sproule, Clerk.
[43]

And thereafter, on Nov. 14, 1912, an order allowing writ of error was duly entered herein, in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

versus

GREAT WESTERN LIFE INSURANCE COM-
PANY,

Defendant.

Order Allowing Writ of Error and Fixing Bond.

At a stated term, to wit, the September term, 1912, of the District Court of the United States of America, in and for the District of Montana, held at the courtroom in the city of Butte, Montana, on the 14th day of November, 1912, upon motion of H. J. Miller, Esquire, attorney for the defendant above named, and upon the filing of a petition for a writ of error and the assignment of errors, it is ordered that a

writ of error be, and the same is hereby allowed for a review in the United States Circuit Court of Appeals for the Ninth Circuit, of a judgment heretofore entered in this cause.

The amount of bond on said writ of review be, and the same is hereby, fixed in the sum of Sixty-five Hundred (\$6500.00) Dollars, which bond, when given and approved, shall operate as a supersedeas.

GEO. M. BOURQUIN,
Judge.

Filed and entered November 14, 1912. Geo. W. Sproule, Clerk. [44]

Thereafter, on Dec. 2, 1912, bond on writ of error was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

ESTA M. SNAVELY,
Plaintiff,
versus

GREAT WESTERN LIFE INSURANCE COM-
PANY,
Defendant.

Bond [on Writ of Error].

KNOW ALL MEN BY THESE PRESENTS:
That we, the Great Western Life Insurance Company, as principal, and National Surety Company, a corporation, duly authorized to act as a surety, are held and firmly bound to the above-named plaintiff, in the sum of Sixty-five Hundred (\$6500.00) Dollars,

for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed and dated this 27th day of November, 1912.

Whereas, the above-named defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the above-entitled cause in the said above-named court on the 11th day of June, 1912;

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute the said appeal to effect and answer all damages and costs, if it fails to make its defense good, and obey the orders of the Court herein and pay this said judgment herein in the sum of \$6500.00 in case the same is affirmed, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

NATIONAL SURETY COMPANY.

By M. J. WALSH,

Its Attorney in Fact.

By JAMES F. O'CONNOR,

Attorney in Fact.

Aprvd.—BOURQUIN, J.

Dec. 2, 1912.

Filed Dec. 2, 1912. Geo. W. Sproule, Clerk. [45]

Thereafter, on December 3, 1912, a Writ of Error was duly issued herein, which said Writ of Error is hereto annexed and is in the words and figures following, to wit: [46]

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States to the Honorable
Judge of the District Court of the United States,
for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between Esta M. Snively, Plaintiff, and Great Western Life Insurance Company, Defendant, a manifest error hath happened, to the great damage of the said Great Western Life Insurance Company, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in said Circuit, on the second day of January, 1913, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, [47] the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to

the laws and customs of the United States, should be done.

WITNESS The Honorable GEO. M. BOURQUIN, Judge of the United States District Court, for the District of Montana, this 3d day of December, A. D. 1912, and the 137 year of the Independence of the United States of America.

[Seal]

GEO. W. SPROULE,

Clerk of the District Court of the United States for the District of Montana.

Service of the above and foregoing writ of error is hereby acknowledged, and copy thereof received, this 5th day of December, A. D. 1912.

E. M. NILES and

FRED L. GIBSON,

Attorneys for Plaintiff and Defendant in Error.

[48]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,

Clerk. [49]

[Endorsed]: Original. No. 1041. In the District Court of the United States, District of Montana. Esta M. Snavely, Plaintiff, vs. Great Western Life Insurance Company, Defendant. Writ of Error, Filed and entered Dec. 6th, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [50]

And thereafter, on December 3, 1912, a Citation was duly issued herein, which said Citation is hereto annexed, and is in the words and figures following, to wit: [51]

Citation on Writ of Error.

United States of America,
District of Montana,—ss.

To Esta M. Snavely, Greeting:

YOU are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, on the 2d day of January, 1913, next, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States, for the District of Montana, wherein Great Western Life Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done by the parties in that behalf.

Given under my hand at the city of Butte, in the District of Montana, this third day of December, in

the year of our Lord one thousand nine hundred and twelve.

GEO. M. BOURQUIN,

U. S. District Judge, District of Montana.

Service of the above and foregoing citation is hereby acknowledged, and copy thereof received, this 5th day of December, A. D. 1912.

E. M. NILES and

FRED L. GIBSON,

Attorneys for Plaintiff and Defendant in Error.
[52]

[Endorsed]: No. 1041. In the District Court of the United States, District of Montana. Esta M. Snavely, Plaintiff, vs. Great Western Life Insurance Company, Defendant. Citation. Filed and entered Dec. 6th, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [53]

And thereafter, on December 9th, 1912, a Stipulation as to the record and exhibits herein was filed in said cause, being as follows, to wit: [54]

*In the District Court of the United States for the
District of Montana.*

ESTA M. SNAVELY,

Plaintiff,

versus

GREAT WESTERN LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

Stipulation [Concerning Transcript of Record and Original Exhibits].

It is hereby stipulated by and between the respective parties, plaintiff and defendant in the above-entitled action, by and through their attorneys, that all of the papers used in the above case in connection with the removal of the same from the State courts to the above-entitled court, may be omitted from the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

It is also further stipulated that all original exhibits* in the case may be sent directly to the said United States Circuit Court of Appeals for the Ninth Circuit, including Exhibit "A," which is a copy of the policy sued on in the above-entitled cause and which is set forth in the complaint herein on file.

Done at Livingston, Montana, this 5th day of December, 1912.

E. M. NILES,
FRED L. GIBSON,
Attorneys for Plaintiff.
H. J. MILLER,

.....,
Attorneys for Defendant.

Filed Dec. 9, 1912. Geo. W. Sproule, Clerk. [55]

*Copies of all original exhibits appear in Bill of Exceptions.

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 56 pages, numbered consecutively from 1 to 56, is a true and correct transcript of the pleadings, process, verdict and judgment, and all proceedings had in said cause, and of the whole thereof, except those portions omitted by stipulation, as appears from the original files and records of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the costs of the transcript of record amount to the sum of Twenty and 30/100 Dollars (\$20.30), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States District Court for the District of Montana, at Helena, Montana, this 13th day of December, A. D. 1912.

[Seal]

GEO. W. SPROULE,
Clerk. [56]

[Endorsed]: No. 2231. United States Circuit Court of Appeals for the Ninth Circuit. Great Western Life Insurance Company, a Corporation, Plaintiff in Error, vs. Esta M. Snively, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received December 21, 1912.

F. D. MONCKTON,
Clerk.

Filed December 28, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

13

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT WESTERN LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error.

vs.

ESTA M. SNAVELY,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action brought by the defendant in error against plaintiff in error to recover the sum of \$5,000.00 and interest on an Insurance Policy issued by plaintiff in error on the life of one Arthur G. Snavely who died on the 3rd day of July, 1910, and who was the husband of defendant in error.

The policy was issued on the 27th day of December, 1907, and lapsed and became null and void on the 27th day of January, 1909, by reason of the Insured failing to pay the premiums as they became due under the terms of the policy (Tr. page 12).

On the 24th day of February, 1909, the Insured made application in writing to the Insurer (plaintiff in error) to renew the policy (Tr. page 8). That, among other things, the reinstatement contract provided as follows: "That I am in good health and free from every ailment and complaint. . . . That I have not had any injury, sickness or ailment of any kind and that I have not consulted or been prescribed for by any doctor or received any medical treatment since the date of my original application on which said policy was issued, except as here stated. 'Operation Appendicitis, Sept. 1st, 1908. Off duty two weeks, entirely recovered,' and I hereby renew the statements and agreements contained in said original application and expressly agree that if any answer or statement made or contained herein be untrue in any respect, then said policy is and shall continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect. Said policy shall not be revised until the certificate and revival contract be approved by this Company."

Insured paid all premiums due under the terms of policy and contract of reinstatement.

Insurer, plaintiff in error, is resisting payment of the policy upon the ground that the statements made by Insured in application for reinstatement in regard to his being in good health and not having any sickness or ailment of any kind were false and untrue; and that at that time he was suffering from a disease from which he died, and that said statements were fraudulently made by the Insured, knowing them to be false and untrue and for the purpose of securing a revival of the policy.

These fraudulent representations on the part of the Insured

are set forth in Insurer's answer as an affirmative defense (Tr. pages 6-11).

Defendant in error who is beneficiary under the policy insists that, as the policy contains a provision to the effect that it is incontestible after one year from the date of issuance, and as it was in effect for a period of one year or more before it lapsed for failure to pay the premiums, and as it was in effect for a period of one year or more after reinstatement before Insured died, the Insurer, plaintiff in error, even though the Insured fraudulently represented the condition of his health in the application for reinstatement, knowing his representations to be untrue, cannot now avail itself of such defense in the face of the incontestibility clause. *Supra*.

A Demurrer was filed by the defendant in error to that portion of the answer containing the defense above outlined and it was by the Honorable Carl Rasch, overruled. A reply was thereafter filed by defendant in error denying the defense of fraud. Thereafter the cause was tried before the Honorable George Bourquin, sitting with a jury. After defendant in error rested and the plaintiff in error commenced to offer its proof in support of the allegations of the answer, the defendant in error interposed an objection to the introduction of any evidence to prove the allegations of fraud in the answer and the same was sustained, to which ruling of the court an exception was taken (Tr. pages 35-41).

Thereupon the court on motion directed a verdict in favor of the defendant in error, to which action of the court plaintiff in error duly excepted (Tr. page 43).

ASSIGNMENT OF ERROR.

The court erred in sustaining the objection made by the defendant in error to the introduction of any evidence to establish the allegations of fraud and fraudulent representations contained in the answer as having been made in the application for the policy and the application for reinstatement (Tr. pages 35-43).

ARGUMENT.

The argument used by the plaintiff in error in discussing this assignment of error is applicable to the error complained of where the court directed the jury to return a verdict for the defendant in error, as the motion for the directed verdict was sustained upon the same ground that moved the court to sustain the objection to the introduction of evidence to prove fraud, etc.

As a preface of what is to follow, will say that we are unable to find a decision of any court construing an application for reinstatement in an Insurance Company which contained the representations and agreements and warranties contained in the application in question.

In the application for reinstatement, you will observe that the Insured agreed as follows: "*That I have not had any injury, sickness, ailment of any kind and that I have not consulted or been prescribed for by any physician or received any medical treatment since the date of my original application on which said policy was issued, except as here stated, 'Operation for appendicitis, Sept. 1st, 1908, off duty two weeks, entirely recovered,' and I hereby renew the statements and agreements contained in said original application and expressly agree that if*

any answer or statement contained herein is modified in this contract or if any statement contained herein be untrue in any respect, then said policy is and shall continue to be absolutely null and void and reinstatement thereof inoperative and of no effect."

We contend first that the Insured made representations as to the condition of his health that amounted to warranties; then he expressly said that if any of those representations or warranties were untrue in any respect that the policy should continue to be null and void and reinstatement thereof inoperative and of no effect. He not only expressly made this statement but he expressly agreed that the policy was to remain null and void and be inoperative and of no effect in the event that there was any one of the representations aforesaid untrue.

For the purpose of this argument, the position of the plaintiff in error in regard to the falsity of the representations must be taken as true. As heretofore stated, we have been unable to find a decision of the court construing a like contract of reinstatement, but if agreements are to be observed and to be given any sanctity by the courts, it seems that this court ought to take the Insured at his word and not make any better contract for him than he himself did.

The following cases referred to touch upon the case and in a measure are authority for the position taken by the plaintiff in error:

Sweeney vs. Life Insurance Co. 38 L. R. R. 297.

Filling vs. Pope, 115 U. S. 213.

Northington vs. Wright, 115 U. S. 188.

The effect of a stipulation amounting to a warranty is to

render the accuracy of the state of facts alleged in it a condition precedent of the Insurer's responsibility and it becomes bound only "if" and "in the event that" they are literally as the assured had represented them to be.

Angell on Life and Fire Ins. Co., Sec. 307.

The Supreme Court of Texas in the case of *Ash vs. Life Ins. Co.* 26 Texas, Civil Appeal 502, which is probably quoted more by the courts generally in the United States touching upon matters such as are involved herein, holds that the falsity of such representations or warranties renders the renewal contract invalid. Some courts have seemingly held that the renewal contract together with the policy constituted the old original contract between the parties, but this view is not upheld by the courts generally.

The reinstatement application constitutes a new contract and to it the court must look to see what the parties agreed to.

Pacific Mutual Life Ins. Co. vs. Galbraith, 91 S. W. 204.

Welsh vs. Union Life Ins. Co. 78 N. W. 583 holds that in the face of an incontestability clause, that fraud vitiates and destroys every contract into which it enters.

Many courts have held that a contract, wherein fraud is waived as a defense, is void as against public policy.

Reagan vs. Life Ins. Co. 2 L. R. A. (N. S.) 821.

These cases, while not construing a contract such as is under consideration in this case, will aid the court somewhat in reaching its conclusion.

We respectfully submit that the objection to the introduction

of such evidence should have been overruled and that the court erred in sustaining such objections and likewise erred in directing a verdict in favor of the defendant in error.

Respectfully submitted,

H. J. MILLER AND

JAMES F. O'CONNOR.

Attorneys for Plaintiff in Error.

Section 5050
Montana Codes 1907.

Due legal and timely service of the foregoing brief, and a receipt of a true copy thereof is hereby acknowledged this
----- day of February, 1913.

14

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT WESTERN LIFE INSURANCE
COMPANY, a Corporation,

Plaintiff in Error,

vs.

ESTA M. SNAVELY,

Defendant in Error.

No. 2231.

BRIEF OF DEFENDANT IN ERROR.

The statement of the case by the plaintiff in error in the brief is substantially correct.

ARGUMENT,

The plaintiff in error contends that the re-instatement of the policy constituted a new contract, based on the terms of the application for re-instatement and that as the statements in the application were alleged to be false the policy was not revived.

The defendant in error contends that the policy, although it had lapsed by failure to pay premiums, was never entirely null and abrogated, but that by its terms it could be revived by the insured and in fact was revived; and secondly that if the policy was so revived, more than one year elapsed before the death of the insured, and hence by the terms of the policy it is incontestable. Upon a careful investigation of the authorities cited by the counsel we find no real basis for the contention of the plaintiff in error, and the cases cited we submit are not in point and do not, either by inference or analogy, support its contention in the case at bar.

As to the first contention of the defendant in error that the policy was revived, it has been held that a condition of a policy of life insurance that the policy shall be void if premiums are not paid when due, means only that the policy shall be voidable and the breach may be waived.

Grigsby vs. Russell, 222 U. S. Sup. Ct. Rep. p. 149.

If under the contract it was to be re-instated upon written application with evidence of insurability, satisfactory to the company, we submit that nothing further could be demanded by the insurer, and if the insurer did demand anything further of the insured or if the insured voluntarily furnished anything more, it would not bind him.

“Under a provision in the policy the insured may be entitled, on such conditions as are imposed therein, to a restoration of the policy, which after such restoration continues to be the contract of the parties as before.”

25 Cyc. 847.

Goodwin vs. Provident Sav. Life Assurance Asso. 97
Ia., 226.

66 N. W. 157.

The policy provides, "That in case of default in the payment of any premium or interest, the company will re-instate the contract at any time, if not previously surrendered for its cash value, upon application by the insured to the company at its home office, with evidence of insurability satisfactory to the company, and the payment of all premiums that would have been paid if no default had been made."

In the application for re-instatement, which the company demanded of the insured, certain conditions were imposed which were not authorized by the terms of the policy, and the insured was compelled to subscribe to certain conditions therein which should not have been required of him. It is a well settled principle that such conditions are not valid and binding.

25 Cyc. p. 849.

Coburn vs. Life Indemnity Co., 55 N. W. 373.

Mutual Life Ins. Co., vs. French, 27 Am. Rep. p. 443.

In the case of the Pacific Mutual Life Insurance Company vs. Galbraith cited by counsel for the plaintiff in error, it seems to be there held that a re-instatement creates a new contract, that is a new assurance, though under the former policy, but it is observed that the court there holds,

"That if this be its nature, then it must operate in the future from the date of its re-instatement, and whatever

might be its original date or howsoever long it may have run, yet it would seem by the force of necessary logic to follow that the incontestable clause would begin its new life with the date of the new contract.”

It will further be noticed that in the Galbraith case the period of time specified in the incontestable clause had not elapsed and the court held that evidence should have been admitted as to representations made in the application for re-instatement. But we submit that in the case just cited the question of whether the application for re-instatement contained demands not authorized by the policy does not appear and was not considered by the court, nor does it appear that the statements made in the application for re-instatement were any different from those made in the original application and it may be here assumed that those questions were not before the court, and the rule laid down by the court in the Galbraith case precludes the plaintiff in error in this case from contesting the payment of the policy upon any grounds whatever.

In the case of the Mutual Reserve Fund Life Association vs. Austin, 73 C. C. A. page 498, we have a case which is in point and which we submit is in support of our position in the case at bar. The contention of the company in that case was that the incontestable clause did not apply because the insurance policy was never in force, by reason of false representations made in the application. The policy in that case contains these provisions, to-wit: “If this policy of insurance shall have been in continuous force for three years from its date, it shall thereafter be incontestable, except for non-payment of premiums as herein provided, or for mis-statement of the age of the member

in the application therefor, subject to the provision hereof.”

A further provision in the policy is, “This contract shall not take effect until this policy is delivered to the member in person, during his life time and while in good health, nor until the first payment is paid in cash while said member is also in good health.”

The court states as follows:

“It is established as a fact that Austin was not in good health, within the meaning of the application for policy, either when the applications were made or when the policies were delivered, or when the first premiums were paid. It is further established that the policies were delivered to Austin on April 14, 1897, that he paid the first payment and all premiums as stipulated in each policy until his death, October 5, 1902. The company does not rely on false or fraudulent representations and disavows any intention to avoid its policies for breach of warranties. The contention was that the good health of the applicant was a condition precedent and that no contractual relation therefor ever existed between the applicant and defendant below.”

However, the Circuit Court of Appeals refused to consider that as a valid defense on the part of the insurance company and held that under the conditions inserted by the parties it became effective on delivery and set in motion the incontestable clause, so as to cut off all defenses based on fraud and falsity after the period in which, by the terms of the policy, the same was contestable.

In the case of *Carpenter vs. Providence Washington Insur-*

ance Co., 16 Peters, page 495, Mr. Justice Story said:

"It is not true, that because a policy is procured by misrepresentation of material facts, it is, therefore, to be treated in the sense of the law as utterly void ab initio. It is only voidable and may be avoided by the underwriters upon due proof of the facts, but until so avoided, it must be treated for all practical purposes as a subsisting policy."

It has been held, "That where a policy of life insurance, as well as the application therefor, stipulates that after the application was approved and the policy issued, it should be in force from the date of the application, a further provision in the application that the contract of insurance should not take effect until the payment of the first premiums, by the applicant during his continuance in good health, was only a provisional agreement, authorizing the insurer to withhold the policy until such payment in good health, and that an actual delivery of the policy by the company would estop it in the absence of fraud from asserting an avoidance of its contract, by reason either of the assumed ill health, or the non-payment of the premium; such stipulations having been asserted in the application as conditions to excuse the insurer from delivery of the policy, could not serve as grounds for invalidating the policy after delivery."

Grier vs. Mutual Life Insurance Co., 44 S. E. page 28.

The policy in the case at bar contains a clause as follows: "This contract is incontestable after one year from date of issue."

A clause now often inserted in policies, that after being

in force a specified time they shall not be disputed or contested, precludes any defense after the stipulated period, on account of false statements which were warranted to be true, even though they were made fraudulently.

25 Cyc. page 872. Cases cited.

4 Am. and Eng. Annotated, page 364 and notes.

The view taken by the court as to such a clause is that it merely operates as a short statute of limitations in favor of the insured and says within what time the falsity of the policy shall be contested, if at all.

Mass. Benevolent Life Asso. vs. Robinson, 104 Ga. p. 256.

Wright vs. Mutual Benefit Life Asso., 118 N. Y. p. 237.

13 Am. and Eng. Annotated Cases, page 305.

Kansas Mutual Life Insurance Co., vs. Whitehead, 123 Kan.

Where a life insurance policy contains a provision that it shall be incontestable after two years, such provision applies to representations required and made in a certificate of re-instatement after a lapse for non-payment of an assessment, and after two years the company is barred from contesting the policy on the ground that the statements contained in the re-instatement certificate are untrue.

Teeter vs. U. S. Life Ins. Asso., 54 N. E. p. 72.

Pacific Mutual Life Ins. Co., vs. Galbraith, 112 Am. S. R. p. 862.

Wright vs. Asso. 118 N. Y. p. 237.

23 N. E. p. 186.

In the case of *Teeter vs. Insurance Co.*, above cited, we have a case which is practically identical with the one at bar and possessing the same principle involved in this case, and in that case the court said:

“That it seems to us after an examination of the contract that the defendant had two years after the re-instatement within which to investigate the condition of *Teeters’* health at the time of making the re-instatement certificate, and that after that time the policy became again indisputable.”

The logic and soundness of that holding cannot be questioned and is in keeping with all of the authorities on the question, and is controlling in the case at bar.

The plaintiff in error states in his brief (page 5) that “this court ought to take the insured at his word and not make any better contract for him than he himself did.” Of course, the court does not make contracts. In this case the court is called upon to construe a contract which contains this clause: “This contract is incontestable after one year from date of issue.” The contract in which the clause is found and which the court is called upon to construe is a contract of life insurance; the clause was placed in the contract by the insurer to induce the assured to take out insurance and to give to the assured an assurance that after the policy had been issued one year, and if the premiums were paid and the insured should die, his beneficiary would not be met by a defense of fraud or misrepresentations in obtaining the insurance. This clause cuts off defenses based on alleged fraudulent representations in obtaining either the policy originally or its re-instatement.

Another point that was urged upon the argument of the objection made by the defendant in error to the admission of evidence to show fraud or fraudulent representations in the obtaining of the contract or its re-instatement was that the alleged fraudulent representations were contained in an application for insurance or in an application for re-instatement and were not made a part of or contained in the policy, the policy having been delivered in the state of Montana after Jan. 1st, 1908, and that under section 5593 of the Revised codes of the state of Montana of 1907, such application or statements made in it could not be received in evidence. That section of the Statutes of Mont. reads as follows:

“Sec. 5593. Every policy of insurance issued or delivered within this state on or after the first day of Jan., 1908, by any life insurance corporation doing business in the state shall contain the entire contract between the parties.”

This statute was evidently intended for the purpose of preventing an insurer from contesting the payment of insurance on grounds of alleged falsity of statements made in the application unless such application is set forth in the policy and made a part thereof.

This is pursuant to a wise and proper public policy. But the policy of insurance in this case by its own terms goes farther than the statute requires and the insurer promises that it shall not contest payment of the policy after one year from its date issue, if the insured shall pay the premiums as provided in the policy.

This is the clear and plain meaning of the language used. The clause contains no exceptions. The courts wherever incontestable clauses have been construed by them in policies of insurance have given the clause the meaning and application contended for by defendant in error in this case, and in truth the language of the clause is so clear and free from ambiguity that there is no room for construction, and none can be given the clause, other than the plain meaning of the words used. The plaintiff in error has failed to cite any authority in point as an examination of the cases cited will show, and in fact counsel virtually admits it in their brief.

We summarize as follows: It is admitted by the pleadings and by the policy in evidence that the policy would be forfeited for the non-payment of premiums and that it would again be re-instated upon the written application of the insured with satisfactory evidence of his insurability; that the policy did lapse for non-payment of premiums and that the insurance company did re-instate the policy and did accept the evidence that the insured offered as to his insurability.

There is no dispute but what the incontestable clause in a policy of insurance is valid and binding on the insurance company. The plaintiff in error claims that the incontestable clause in the case at bar does not take effect by reason of the fact that the representations made by the assured, in his application for reinstatement, are alleged to be false and fraudulent, but the plaintiff in error cited no authority, nor presents any logical argument in its support, whereas the case of Mutual Reserve Fund Association vs. Austin, above cited, holds absolutely to the contrary, and the logic and soundness of the reasoning of

the court in that case, we submit cannot be questioned.

We submit that the policy, though it had lapsed for non-payment, was never entirely abrogated and void. It, by its very terms, retained life and the insured, by virtue of the contract itself, had some rights under it, and one of the rights which the assured had was to have the policy reinstated by paying up the premiums and satisfying the company of his insurability. The insurance company did not and by virtue of the terms of the policy could not make any other terms with the insured only in accord with the terms of the policy. If the policy is re-instated, and this is admitted, then we have the same policy and the same contract we had before, no more and no less, and the only contract that has ever been between the parties was the original policy.

The plaintiff in error does not question the validity of the policy or of the incontestable clause up to the time the application was made for re-instatement, but now contends that the terms of the original contract are to be considered and interpreted by what the application for re-instatement sets forth, although the company compelled the insured to furnish more than the original policy called for as grounds for re-instatement.

We submit that everything contained in the application for re-instatement, further than what was necessary to state, as to the insurability of the insured, was given without any consideration passing to the assured and was not warranted or called for by the original contract, and hence is as the lower court stated, simply nudum pactum.

The plaintiff in error doesn't hope to prevail in this case un-

less it can establish the validity and competency of that part of the application for re-instatement, not directly authorized by the policy, and the insurance company would have this court take the position that plaintiff in error had the right to make any demands and insist on any exactions from the assured which it saw fit to impose, in order to re-instate the policy, and if this reasoning is sound the company could as well have demanded that the insured waive his right under the incontestable clause, or it could have gone farther and demanded a higher premium or made him terms less advantageous than the policy allowed. We contend that this argument is not sound, that the policy and the conditions therein stated are to control, and we have a right to assume that the assured considered the contract, the incontestable clause and the terms for re-instatement when he took out the policy and the assured has a right to depend upon the insurance company to carry out its terms of the contract.

It stands admitted that the assured has fully complied with his part of the agreement; the company has failed to carry out their terms of the agreement when they demanded more than was their right to receive from the assured before they would re-instate the policy, and we submit that what they demanded beyond what was their right to demand, is not binding on the assured, is without consideration, and ought not to be considered for any purpose whatever. It appears to us that no new contract was ever made, that the old contract, which had lapsed, was simply revived, and if that reasoning be true, then we cannot get away from the fact that the incontestable clause precludes the plaintiff in error from making any defense whatever.

If, upon the other hand, it may be considered as a new con-

tract having been made, which would consist of the old policy and the application for re-instatement, do we not still have the incontestable clause which would preclude the company from any defense on any grounds after the period of incontestability had elapsed, since the formation of the new contract? Could any line of reasoning prove that there could be any difference in the statements made by the assured when he first took out the policy, or in the statements he made when the policy was revived so far as the effect in the application of the incontestable clause is concerned? And hence we submit that whether the court may look at this policy of insurance in the case at bar, either as an old contract revived and re-instated, or whether it is a new contract, the terms of which are taken from the old contract, it is entirely immaterial, as the rights of the assured and the liabilities of the insurer are in either case identical under the terms of this policy.

It appears to us conclusively that, inasmuch as the policy was reinstated and revived, the insurer being satisfied with the insurability of the insured and accepting his premiums in full payment, and the period of incontestability having run, that the plaintiff in error is now estopped from questioning its own contract, the terms of which the insured accepted in taking out the policy.

We respectfully submit that the judgment appealed from should be affirmed.

E. M. NILES,
FRED L. GIBSON,
Attorneys for Defendant in Error.